

ROBERTA CROSS GUNS
Special Assistant Attorney General
Office of the Commissioner of
Securities and Insurance
Montana State Auditor
840 Helena Avenue
Helena, MT 59601
406-444-2040 (phone)
406-444-3499 (fax)

rcrossguns@mt.gov

NANCY SWEENEY
LEWIS AND CLARK DISTRICT COURT

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FILED
BY J. STEAB
DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RONALD MOSCHETTA,)	CAUSE NO.: CDV-2010-685
)	
Petitioner,)	
)	
vs.)	BRIEF IN SUPPORT OF MOTION
)	TO DISMISS
MONICA J. LINDEEN, Commissioner of)	
Securities and Insurance, Montana State Auditor,)	
)	
Respondent)	

The Commissioner of Securities and Insurance, Montana State Auditor (CSI), by and through her legal counsel, Roberta Cross Guns, respectfully submits her brief in support of her motion to dismiss Petitioner Ronald Moschetta's petition for judicial review.

PROCEDURAL HISTORY

The CSI's Securities Department (Department) entered into a consent agreement with Plaintiff Ronald Moschetta (Moschetta) dated April 20, 2009. A copy of the consent agreement is attached to this motion as Exhibit A. By signing the consent agreement, Moschetta agreed to pay an administrative fine of \$2,000, to contribute \$1,500 to the Investor Protection Fund for the benefit of Montana investors, and to offer rescission to the alleged victims. The check provided to the State of Montana as payment of the \$2,000 fine was returned for non-sufficient funds to

cover the check. See affidavit of Sharon McCabe, attached as Exhibit B. The victims accepted the offer of rescission pursuant to their signing the offer document, attached as Exhibit C. The rescission offer was for \$51,170.06 as required by the consent agreement. Moschetta did not pay the rescission as he agreed to in the consent agreement. See affidavit of Stephanie Clark, attached as Exhibit D. Moschetta did make the contribution to the Investor Protection Fund as agreed to in the consent agreement.

The Department filed a Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing (Agency Action) dated July 2, 2009, to enforce the terms of the consent agreement. The Agency Action is attached as Exhibit E. The Agency Action was sent by certified mail, with a return receipt that was, in fact, signed and returned to the Department. See Exhibit F. One term of the consent agreement was that should any of the named respondents fail to meet the terms of the consent agreement that respondents would be liable for an additional \$40,000 fine. The Department filed an Amended Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing (Amended Action) dated October 30, 2009, attached as Exhibit G. The Amended Action was sent by certified mail, with a return receipt that was, in fact, signed and returned to the Department. See Exhibit H. Moschetta failed to request a hearing or otherwise defend in the case.

The Department filed its motion for entry of default dated March 4, 2010, attached as Exhibit I. The default was entered and a notice of entry of default issued with a date of March 4, 2010, attached as Exhibit J. Moschetta failed to ask to set aside the default. Then the Department filed its motion for entry of default judgment dated April 2, 2010, allowing nearly 30 days for Moschetta to ask the default be set aside. See Exhibit K. Then the Department filed proposed findings of fact, conclusions of law and order, supported by affidavits and documentary

evidence dated April 26, 2010. See Exhibit K. Again, Moschetta failed to respond in any manner. Subsequently, a final agency decision issued dated May 18, 2010. See Exhibit L.

Moschetta filed his petition for judicial review pursuant to Mont. Code Ann. §§ 2-4-702 and 30-10-308, on or about July 15, 2010. No responsive pleading is required. The Department transmitted the record of the case to the Court on or about July 22, 2010.

LAW AND ARGUMENT

1. This court lacks subject matter jurisdiction of this matter.

The Montana Supreme Court has long held that a district court may not take subject matter jurisdiction of a case arising from an administrative process pursuant to the Montana Administrative Procedures Act (MAPA) before the party seeking judicial review has exhausted all administrative remedies. In 2002 the “exhaustion” maxim was reiterated in *Art v. Montana Dept. of Labor and Industry, ex rel., Mason*, 313 Mont. 197, 60 P.3d 958 (2002). The *Art* Court explained that MAPA offered more than one opportunity for review by the administrative agency before a case becomes ripe for judicial review. *Id.* at ¶13. The Court then cited to the judicial review statute found at Mont. Code Ann. § 2-4-702 (1) (a), which specifically states all administrative remedies must be exhausted before initiation of judicial review for contested cases. *Id.* Finally, the Court explains how the judicial review statute is the very “embodiment of the maxim of ‘exhaustion of remedies’” and provides a lengthy repertoire of case law on point. *Id.* at ¶14. The Court affirmed the district court’s dismissal of the case for lack of subject matter jurisdiction. *Id.* at ¶17 and ¶18.

In this case, Moschetta failed to exhaust his administrative remedies. This case was prosecuted pursuant to the MAPA and was a contested case as defined at Mont. Code Ann. § 2-4-102 (4). While Moschetta relied on the Securities Act, as well as MAPA for his appeal time

frame, the case was prosecuted pursuant to MAPA. By failing to defend in the case, request a hearing and then failing to seek to set aside the default, Moschetta failed at every turn to utilize his administrative remedies.

While Moschetta explains his failure to request a hearing as being the result of “an unknown person” accepting service of the certified mailings containing the Agency Action and the Amended Action, he does not explain his failure to alert the Department to the failure to serve in an email exchange where Moschetta is specifically informed about the date of the Amended Action and the Department’s receiving a signed return receipt. In the email exchange Moschetta does not refute the service. See the attached Exhibit M, an affidavit and print-out of the exchange. Furthermore, none of the mail sent to the address provided by Moschetta on the CRD¹, was returned to the Department, completely negating his assertion regarding the “unknown person.”

Furthermore, Montana’s Rules of Civil Procedure indicate service may be properly effected pursuant to a specific statute, if one applies. Mont. R.Civ.P. 4D. In this case, the Montana Securities Act at Mont. Code Ann. § 30-10-107 (8), specifically provides

Except as specifically provided in this title, an order or notice may be given to a person by personal delivery or by mail addressed to that person at the person's last-recorded principal place of business on file at the commissioner's office. An order or notice that is mailed is considered to have been given at the time it is mailed.

The Department sends its Notices of Proposed Agency Disciplinary Actions by certified mail, but that does not obviate the provisions of Mont. Code Ann. § 30-10-107 (8). The Montana Supreme Court has upheld this concept of service according to specific statute outside the Rules of Civil Procedure since 1988. See *Taylor, Thon, Thompson & Peterson v. Cannady*, 230

¹ FINRA operates Web CRD®, the central licensing and registration system for the U.S. securities industry and its regulators. It contains the registration records of more than 6,800 registered broker-dealers and the qualification, employment, and disclosure histories of more than 660,000 active registered individuals.

Mont. 151, 749 P.2d 63 (1988). Thus, Moschetta was served by operation of law, pursuant to the specific statute governing the operations of the Department.


Moschetta was served copies of the Agency Action and the Amended Action by mail addressed to the address of his last-recorded principal place of business on file at the Commissioner's office. The record of Moschetta's last-recorded address is the CRD, to which the Department has specific access as a state regulator.

It is clear Moschetta knew about the Agency Action and the Amended Action and he failed to exercise his administrative remedies, as required prior to filing a petition for judicial review at Mont. Code Ann. § 2-4-702 (1).

CONCLUSION

The Court should dismiss Moschetta's petition for judicial review because it lacks subject matter jurisdiction due to Moschetta's failure to exhaust his administrative remedies. Moschetta's claim he was not properly served and therefore lacked the ability to exhaust his administrative remedies is without merit.

DATED this 20th day of August, 2010.



Roberta Cross Guns
Special Assistant Attorney General
Attorney for Commissioner of Securities and Insurance

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of August, 2010, a copy of the foregoing was served upon the following by depositing a true and correct copy thereof in the United State mail, postage prepaid, addressed to:

Brian Gallik
J. Devlan Geddes
Goetz Law Firm
PO Box 6580
Bozeman, MT 59771-6580

Roberta Cross Sims
Office of the Commissioner of Securities and Insurance